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IN THE

Supreme Court of the United States

October Term, 1942.

No. 488.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

CHICAGO STOCK YARDS COMPANY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX TO RESPONDENT'S BRIEF.

	Page
I. The Facts	1
II. Under Rule 38 the Petition Should Not Be Granted	1
III. The Judgment of the C. C. A. Averted a Grave injustice	9

TABLE OF CITATIONS.

	Page
Deputy v. DuPont, 308 U. S. 488, 499	2
Dunbar v. Commissioner, 119 F. (2d) 367, C. C. A. 7	2
Helvering v. Price, 309 U. S. 409	2
Magruder v. Washington, Baltimore and Annapolis Realty Corp., 316 U. S. 69	2
Treasury Regulation 74, Art. 542	2
U. S. v. Armature Rewinding Co., 124 F. (2d) 589, C. C. A. 8	2

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I.

The Facts.

In note 1 on page 5 of his petition, the Commissioner apprehends that the Taxpayer may not agree with his statement of the "important relevant facts." We do not believe that a brief in opposition is the place for a controversy about facts; but we emphatically do disagree with the Commissioner's summary. The factual summary made by the Circuit Court of Appeals in its opinion is better balanced, fairer, more complete and more accurate than the statement in the petitio (4R. 1267-1277).

II.

Under Rule 38 the Petition Should Not Be Granted.

The writ should be refused for the following reasons:

1. The Circuit Court of Appeals did not err in "overturning" the determination of the Board of Tax Appeals

that the taxpayer was a mere holding or investment company.

The Court, for the reasons set forth in its opinion (4 R 1285-1288), took the facts as found by the Board and merely decided that, *on those facts* the taxpayer was something more than a "mere holding or investment company," as that term is used in Sec. 104 of the Revenue Act.

The activities of the taxpayer were an issue for determination by the Board of Tax Appeals. Whether or not these activities made the taxpayer a "mere holding company" is open for determination by an appellate court. *Deputy v. DuPont*, 308 U. S. 488, 499; *Dunbar v. Commissioner*, 119 F. (2d) 367, C. C. A. 7; *U. S. v. Armature Rewinding Co.*, 124 F. (2d) 589, C. C. A. 8; *Magruder v. Washington, Baltimore and Annapolis Realty Corp.*, 316 U. S. 69; and *Helvering v. Price*, 309 U. S. 409.

It should also be noted that, in deciding this question as it did, the Court was acting in strict accordance with Art. 542 of Treasury Regulation 74 (promulgated under the Revenue Act of 1928) which appears in the Appendix, pages 24-26, of the petition. The attention of this Court is particularly called to the following passage in the Article just cited:

> "When one corporation owns the stock of another corporation in the same or a related line of business and in effect operates the other corporation, the business of the latter may be considered in substance the business of the first corporation. Gains and profits of the first corporation put into the second through the purchase of stock or otherwise may therefore, if a subsidiary relationship is established, constitute employment of the income in its own business. To establish that the business of one corporation can be regarded

as including the business of another it is ordinarily essential that the first corporation own substantially all of the stock of the second."

2. The Circuit Court of Appeals did not err in "overturning" the Board's determination that the taxpayer had accumulated its gains and profits beyond the reasonable needs of the business.

The Court, for the reasons set forth in its opinion (4 R 1290-1295), decided that the Board, in reaching this determination, used an improper "legal yardstick" by which to measure the business needs of the taxpayer. The Court itself made no findings of fact and no final disposition of the question. It merely construed the expression "reasonable needs of the business" as used in Section 104, and remanded the case to the Board to determine by the use of a proper "legal yardstick" whether or not the accumulations found by the Board were beyond the "reasonable needs of the business" as that expression is used in Sec. 104.

3. The Circuit Court of Appeals did not err in "overturning" the Board's determination that the taxpayer was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

The Court did not "overturn" the Board's determination in this respect. While the Board observed in the course of its opinion that the decision might rest either upon the presumption or upon the record without benefit of the presumption, the Court held that the Board had based its decision chiefly upon subsidiary findings which as a matter of law were erroneous. The Court said:—

> "The Board's ultimate finding of forbidden purpose was predicated chiefly upon its findings that petitioner was a mere holding or investment company and that petitioner had accumulated its profits beyond the reasonable needs of the business, coupled with the fact that Prince saved a large amount of surtaxes by the withholding of further dividends." (4 R 1295.)

A reading of the entire opinion of the Board, we submit, amply justifies the Court's view. The Court then did not "overturn" the Board's decision. The Court recognized that the Board might or might not reach the same conclusion had it properly construed the applicable provisions of the Revenue Act. Accordingly, the Court limited its action to remanding the case to the Board to determine whether the ultimate finding of forbidden purpose can stand in the light of the Court's view of the law. That the opinion of the Court goes no further is clear from its final paragraph:—

> "Since we hold that the Board committed errors of law in arriving at its main subsidiary findings, upon which its ultimate inference of forbidden purpose chiefly rested, the case should be remanded to the Board for further consideraiton of its findings and decision in the light of this opinion. When all is said and done, the Board will have before it the ultimate question whether petitioner has sustained the burden of proving that the Commissioner's determination was wrong, that is, whether the Board is satisfied on a preponderance of the evidence that in Prince's decision on behalf of petitioner to distribute no more than $400,000 in dividends in each of the taxable years, the forbidden motive of surtax avoidance played no substantial part." (4 R 1296.)

It may further be observed that in the section of the opinion (3 R, p. 945) in which the Board purports to discuss the case without reference to the presumptions, no single fact is recited which could be a sufficient basis of inference when considered apart from these presumptions. Indeed no single fact in the whole case was so cogently persuasive on the taxpayer's behalf as "the organization of the petitioner"; for the petitioner (the present respondent) was organized in 1911 when there was no income tax to be avoided and not even a constitutional amendment authorizing one. Yet the fact of such organization is instanced by the Board as a basis of inference of a purpose to evade the tax.

If the Government really believed that the Board rested its opinion on the facts of the case aside from the presumptions it would not now be seeking to prevent reconsideration by the Board by applying for this writ. Quite obviously, the Board has been left free by the Court to draw again any legitimate inferences from the facts disclosed by the record.

4. The Circuit Court of Appeals did not err in its treatment of the "presumption" established by 104 (b).

The "presumption" in question is a statutory aid to the Commissioner in proving the existence of the interdicted purpose. The statute provides that a prima facie inference of such a purpose is to be drawn if either of two propositions has first been established. One of these is the proposition that the taxpayer is a mere holding or investment company. The other is the proposition that a corporation with a legitimate need for *some* accumulation has in fact accumulated beyond the reasonable needs of the business.

As to the first, it disappears from this case if (as we respectfully submit) the Circuit Court of Appeals was right in holding that the taxpayer is *not* a mere holding or investment company within the meaning of the Revenue Act.

As to the second, the Court has remanded the case with instructions respecting the proper yardstick by which to determine whether or not the accumulation was excessive. If the Board hereafter finds that it was *not*, the second basis of inference likewise disappears. If the Board finds the accumulation was unreasonably large, then the statutory presumption remains unimpaired by the Court's decision.

Whether the statutory presumption does or does not add much to the established practice which makes the Commissioner's determination of tax liability prima facie sound, is a purely academic question. The Commissioner himself must concede that the statutory presumption does not arise if it is determined that the taxpayer is not a mere holding company and that the accumulation is not excessive. It is the determination of this latter question which the Circuit Court of Appeals has referred back to the Board.

5. The Circuit Court of Appeals did not err in holding that the projected 1940 liquidation of the Jersey Co. coupled with acquisition of sufficient Jersey Common and Preferred stock to be able to control the liquidation was a reasonable need of the taxpayer's business.

The taxpayer (Pet. p. 6) "is the top holding company of what is referred to as the Chicago stockyards enterprise, a great integrated business owning or operating a stockyards, a belt line railway, an elevated street railway, a real estate development of considerable magnitude, power and

light facilities, a national bank serving the stockyard area and other related undertakings of lesser importance."

The Court, for the reasons set forth at length in its opinion (4 R 1291-1293), decided that plans for the liquidation of the Jersey Co. (an intermediate holding company which served no useful purpose) upon the termination of its charter in 1940, were within the scope of the "reasonable needs of the business" of the respondent, as that term was used in Section 104. When the facts are understood, and stated simply, this proposition becomes self-evident. Indeed, the proposition was unanimously accepted by the three witnesses called by the Government. All of them testified that if they had been on the taxpayer's Board of Directors they would have planned for the liquidation and would have accumulated gains and profits for that precise purpose and would have done so during the years in question. (2 R 700, 703) (2 R 802) (2 R 842, 848).

6. The Circuit Court of Appeals did not remand the case upon a false issue.

On the contrary, the Court directed the Board to determine the very question which the statute and the Commissioner's ruling directly and necessarily raised, viz., whether, in the taxpayer's decision to accumulate its income in excess of the substantial dividends it paid, the purpose of tax evasion played any substantial part.

The qualifying word "substantial" was used advisedly by the Court in interpreting the intention of Congress. That there had been no doubt in the mind of the Board that the taxpayer's actual purpose in accumulating income was an honest one is made evident by the following quotations from the record of statements made by the writer of the majority opinion:

"I might state at this point that I never had any doubt from the testimony in this case, that Mr. Prince and the others in authority here had an expectation all during the years 1920 to 1933 inclusive, to liquidate the Jersey Company. I think that the testimony warrants that, but was not the basis of any conclusion that I reached. • • •

"I could not find from the record any evidence that the Maine corporation had any purpose except the purpose of Prince, and the company could not have, the corporation can't have, a purpose except the purpose of its officers or directors, and I have no doubt that Prince had the idea, I think it was plain all through this testimony, that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations." (3 R 1072, 1073.)

The mistake of law made by the Board on this vital matter was to substitute for an actual and honest business purpose a hypothetical and fabricated purpose of tax evasion without even suggesting that this hypothetical purpose had played a substantial part in determining the taxpayer's policy.

The Circuit Court of Appeals, as appears from its opinion (4 R 1279-1281) gave full recognition to the rule, as established by this Court, that it is the function of the Board, not the Circuit Court of Appeals, to draw inferences from the facts and to choose between conflicting inferences. This is because one of the Board's functions is that of a trier of facts. But the Board acts not merely as

a jury: it also has a judicial function. In its capacity as judge it in effect instructed itself as follows:

> 1. I instruct you as a matter of law that the taxpayer is a mere holding or investment company. From that you may infer that it had the forbidden purpose.
>
> 2. I instruct you as a matter of law that the taxpayer had no reasonable need to accumulate. It did accumulate and from that you may infer that it had the forbidden purpose.

The Circuit Court of Appeals perceived that these instructions as to matters of law were error and it remanded the case to the Board solely on the ground that, on the basis of the facts found by the Board, the Board on a proper construction of Sec. 104 committed errors of law. Accordingly, the question before this Court (in case the writ is granted) will be whether the Circuit Court of Appeals correctly interpreted an Act of Congress in the light of undisputed facts. It will not be the question (as the Commissioner would like to have it appear) whether the Circuit Court of Appeals may properly "overturn" a finding of fact by the Board of Tax Appeals.

III.

The Judgment of the C. C. A. Averted a Grave Injustice.

All of the foregoing is pointed to Rule 38 of this Court to show that, under this Rule, the writ should not be granted. If, however, it is within the power of a litigant to do so by concession, the taxpayer is willing to enlarge the operation of the Rule so that certiorari will be granted in this case, if, upon an examination of the whole record,

it appears that the decision of the Court below has resulted in a miscarriage of justice. It is confidently submitted that far from resulting in such a miscarriage, the decision of the Court below actually prevented one.

The taxpayer advanced three propositions before the Board of Tax Appeals as follows: (1) The taxpayer is not a mere holding or investment company. (2) It had a business need to accumulate and it did not accumulate beyond the needs of that business. (3) Its purpose in accumulating was to liquidate the Jersey Company and not to avoid surtaxes.

The Board of Tax Appeals found all the essential facts in respect to proposition (1), then measured them against the Revenue Act and concluded "that the petitioner is a mere holding or investment company." Its measurement was faulty. The Circuit Court of Appeals perceived that the measurement was wrong and overturned the Board. Certainly this was not a miscarriage of justice.

On the second proposition the Board found all the facts and concluded that the taxpayer could not legally have any need whatsoever to accumulate. Without in any sense disturbing the findings of fact, the Circuit Court ruled that the Board on these facts had through error of law reached the wrong conclusion and again overturned the Board. Here again was no miscarriage of justice.

As to the third proposition, the Circuit Court, having learned from the Record that the actual purpose with which the accumulations were made was the liquidation of the Jersey Company and not the avoidance of surtaxes, naturally felt that there must be something seriously wrong in the thinking of a Board which clearly perceived that there was no actual purpose to avoid surtaxes, then fabri-

cated a constructive purpose and imposed the tax. The wrong thinking that had been done was obvious. It lay in thinking that the taxpayer was a mere holding or investment company and a company that simply could not have a need to accumulate. All that the Circuit Court of Appeals did was to correct the erroneous view of the law which the Board held and send the case back with instructions to think about it again and this time to think straight.

Certainly this taxpayer was entitled to have its case determined by a Board prepared to start its thinking about the case on the basis that a company which dominated and directed every important act of this great integrated enterprise was something more than a mere holding or investment company. Certainly this taxpayer was entitled to have its case determined by a Board prepared to start its thinking on the basis that this company had business needs greater than the need to possess a pair of scissors to cut coupons and a pen with which to endorse dividend checks. Can it seriously be urged that there is any miscarriage of justice in sending the case back to the Board for fresh consideration by it but this time with instructions to search for the actual and substantial purpose and not a fabricated or constructive one, and to begin that search without first having made two devastatingly erroneous rulings of law?

Unless the case is sent back, the taxpayer will find itself in the unhappy position of having had its case decided by a Board which failed to perceive that a corporation actually formed for the purpose of operating a great integrated enterprise and which did this for 30 years was not a "mere holding or investment company" having "no need for the accumulation of gains and profits." (R Vol. IV,

1286, 1287.) Such a result would, indeed, be a miscarriag of justice.

Respectfully submitted:

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